Massachusetts Employers See Medical Marijuana Defense Go Up In Smoke

SUPREME JUDICIAL COURT RULING REQUIRES EMPLOYERS TO ENGAGE IN INTERACTIVE PROCESS

Insights
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The highest state court in the Commonwealth of Massachusetts issued a decision yesterday announcing that handicapped employees who have been prescribed medical marijuana may be entitled to a reasonable accommodation under the state's handicap discrimination law, while requiring employers to engage in an interactive process to assist in making this determination. In *Barbuto v. Advantage Sales & Marketing, LLC*, the Supreme Judicial Court (SJC) reversed the dismissal of the employee's handicap discrimination claim, finding that a "qualifying patient who has been terminated from her employment because she tested positive for marijuana as a result of her lawful medical use of marijuana" states an actionable claim of handicap discrimination under Massachusetts's anti-discrimination law.

The holding in this case is quite significant. It now calls into question the validity of zero-tolerance drug policies for employers in the state when medical marijuana is concerned. Unlike decisions of other state supreme courts across the country, this case also permits an employee to go forward with a private right of action against their employer. Businesses with operations in Massachusetts will want to review this decision and determine whether they need to adjust their policies and practices.

Background: Employee Terminated After Positive Drug Test
In 2012, Massachusetts voters overwhelmingly approved an initiative petition permitting the use of medicinal marijuana. Under the Medical Marijuana Act, "any person meeting the requirements under [the Act] shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions."

As alleged in her complaint, Christina Barbuto was hired in 2014 and required to submit to a mandatory drug test. Barbuto told her supervisor that she would test positive for marijuana, explaining that she suffers from Crohn's disease and presenting written documentation from her physician. She completed her first day of work but was terminated when the test results produced a positive result for marijuana as expected. She claims the employer's human resources representative informed her that "we follow federal law, not state law."

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Barbuto filed a charge with the Massachusetts Commission Against Discrimination, and soon brought her case to state Superior Court alleging, among other things, handicap discrimination and wrongful termination in violation of public policy. The trial court dismissed each of these claims and Barbuto appealed.

Analysis: Court Says Reasonable Accommodation May Be Required

On appeal, the employer made two arguments. First, it argued that Barbuto was not a "qualified handicapped person" because the only accommodation she sought – her continued use of medical marijuana – remains illegal under federal law and was therefore facially unreasonable. Second, the employer argued that even if Barbuto was a qualified handicapped person, she was terminated for failing a drug test and not because of her handicap.

The SJC rejected both arguments. It first found that, irrespective of whether marijuana is illegal under federal law, employers "have a duty to engage in an interactive process with the employee to determine whether there were equally effective medical alternatives to the prescribed medication whose use would not be in violation of its [drug] policy." If the interactive process reveals that alternatives would be less effective than medical marijuana, the court said, an exception to the employer's drug policy is a facially reasonable accommodation. The SJC likewise rejected the employer's second defense, noting that such a theory would effectively deny a handicapped employee the opportunity of a reasonable accommodation.

The SJC found support for its reasoning in the statute itself, noting that where the Medical Marijuana Act makes clear that it does not require "any accommodation of any onsite medical use of marijuana in any place of employment," it implicitly recognizes that the offsite use of medical marijuana might be a permissible accommodation. The court also rejected any notion that federal law's continued intolerance for marijuana created a public policy argument against accommodating medical marijuana. Instead, the court recognized the tidal shift that has occurred across the country in the past several decades, with nearly 90% of the states recognizing the accepted medical use of marijuana.

Importantly, however, the SJC noted that its ruling does not mean that Barbuto will succeed on her claim of handicap discrimination. The court kept alive the employer's defense that it might be able to show that permitting the use of medical marijuana is an "undue hardship." For example, the court noted that an employer may satisfy its burden of proving undue hardship where medical marijuana use would impair the employee's performance or pose an "unacceptably significant safety risk to the public, the employee, or her fellow employees." The SJC was also cognizant of certain federal obligations, such as those imposed by the Department of Transportation or contained in federal government contracts, which could satisfy the employer's burden of showing an "undue hardship."

What Does This Mean For Massachusetts Employers?

The decision in *Barbuto* makes clear that Massachusetts employers must now engage in the interactive process where a handicapped employee with a valid medical marijuana prescription tests

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positive for marijuana in violation of a drug policy. Other steps for Massachusetts employers to take in the short term include:

- Revising employee handbooks and policies;
- Determining applicable Department of Transportation regulations;
- Reviewing any federal government contracts;
- Updating human resources training; and
- Carefully considering medical marijuana-related accommodation requests.

If you have any questions about this new law or how it may affect your organization, please contact your regular Fisher Phillips attorney or one of the attorneys in our Boston office at 617.722.0044.

This Legal Alert provides an overview of a specific court ruling. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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